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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. [redacted] 67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1956.

No. .....

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

The petitioner, Nashville Milk Company, prays that a writ of certiorari issueto review the judgment of the United States Court of Appeals for the Seventh Circuit.

REFERENCE TO THE REPORT OF THE OPINION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals, 7th Circuit, sought to be reviewed is reported in 238 F. (2) 86.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1956. No petition for rehearing was filed. The statutory provision conferring jurisdiction on the court to review the judgment of the Court of Appeals is 28 U. S. C. Sec. 1254.

THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is as follows:

Is a party (here the petitioner) injured by a violation of Sec. 3 of the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. Sec. 13-A) entitled to sue the party committing the injury (here the respondent) for damages and injunctive relief under the provisions of Secs. 4 and 16 of the Clayton Act (38 Stat. 730; 15 U. S. C. Secs. 15 and 26)?

STATEMENT OF THE CASE.

1.

Summary of Proceedings in the District Court and Court of Appeals.

Petitioner filed suit for damages and injunctive relief under 15 U. S. C. Secs. 15 and 26 bottomed upon a violation by respondent of 15 U. S. C. Sec. 13-A. Respondent filed a motion to dismiss in the District Court. (Appendix record 13.) The District Court overruled the motion as to two of the grounds, but sustained it as to the third and entered judgment against petitioner dismissing the complaint. (Appendix record 14.)

Petitioner appealed to the Court of Appeals, 7th Circuit, raising as error the ground upon which the District Court had ruled adversely to it. Respondent, relying upon the proposition it might seek to sustain the judgment of the District Court on any of the grounds raised below (*Gallagher and Speck, Inc. v. Ford Motor Company*, 226 F. (2) 728, 7th Circuit (1955)), raised as error the two grounds upon which the District Court had ruled adversely to it. Thus, the case was submitted to the Court of Appeals upon three issues. The court affirmed the District

Court upon one of the issues raised by respondent, but did not pass upon the other two issues. The question presented for review by this petition is the issue determined by the Court of Appeals.

2.

Summary of the Complaint.

The complaint is set forth in full in the appendix record at pages 3-12. The following is a summary of it:

Plaintiff manufactures and sells filled milk in Illinois where filled milk may be lawfully sold. Defendant likewise manufactures and sells filled milk in Illinois. Defendant and its subsidiaries, the stock of which is owned by defendant, own and operate 30 factories in more than 20 states for the processing of filled milk. Defendant's principal office is in California from which it directs the manufacture and sale of its filled milk in Illinois. It maintains a sales office in St. Louis, Missouri with a territory in Illinois from where it conducts an advertising campaign for the sale of filled milk in the Illinois territory. Such advertising campaign consists of newspaper, radio and television advertising transmitted from Missouri into Illinois. Its salesmen enter Illinois from Missouri and take orders for filled milk. Such orders are then transmitted by the salesmen by mail or otherwise from Illinois to defendant's office in Missouri. Thereupon defendant sends directions from Missouri to its factory in Illinois for the filling of the Illinois orders. It also transmits invoices from Missouri to its Illinois factory showing the name and address of the Illinois customers and the amount of filled milk to be shipped to each customer. Defendant ships raw materials into Illinois for the manufacture of filled milk. Defendant's cost of manufacturing

and selling filled milk in Illinois is paid by checks drawn by it on California banks and delivered by it to payees in Illinois and later accepted for payment in California.

Defendant has violated 15 U. S. C. Title 13-A in that it has sold or contracted to sell its filled milk at unreasonably low prices for the purpose of destroying the competition of plaintiff in the sale of its filled milk. Such conduct has occurred in the course of commerce through the means and methods by which defendant advertises, sells and directs the sale of its filled milk in Illinois. As a direct result plaintiff has been unable to compete with defendant and has lost numerous customers to defendant attracted by its unreasonably low prices.

The complaint concludes with a demand for judgment of $1,050,000 and a prayer for injunction.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Court of Appeals for the 10th Circuit Has Reached a Conclusion Contrary to That of the Court of Appeals of the 7th Circuit.

The opinion of the Court of Appeals in the instant case was given on November 1, 1956. On November 6, 1956 the Court of Appeals of the 10th Circuit gave an opinion upon the identical question decided by the Court of Appeals of the 7th Circuit in the instant case reaching a conclusion contrary to that of the Court of Appeals of the 7th Circuit. (*Vance* v. *Safeway Stores*, No. 5366, not yet reported.)

2.

The Issue Decided by the Court of Appeals Is an Important Question of Federal Law Which Has Not Been But Should Be Settled by the Supreme Court.

The Robinson-Patman Act was passed in 1936. (49 Stat. 1526.) Since that time numerous suits for damages have been brought under Sec. 3 of that act. Only one of these cases has reached this court. (*Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, (1954).) While in that case apparently the precise issue was not involved as in the case at bar, this court, in reversing the Court of Appeals, 10th Circuit, sustained a judgment for the plaintiff based upon Sec. 3 of the Robinson-Patman Act. Some of the reported District Court cases where actions for damages have been sustained under Sec. 3 are *Hershel California Products* v. *Hunt Foods, Inc.*, 119 F. Supp. 603 (N. D. Calif., 1954); *Gordon, etc.* v. *Independent Halvah Candies*, 9 F. R. D. 700, D. C. N. Y., 1949; *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, D. C. Cal., 1950; *F and A Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, D. C. Cal., 1951. It is a reasonable assumption that many other actions have been sustained under Sec. 3, but did not require the writing of opinions by District Courts. Hence, those cases have never been reported.

In view of the foregoing the issue here is one of wide public interest. It is an important question of federal law which has not been but should be settled by the Supreme Court.

3.

The Court of Appeals Reached an Erroneous Conclusion.

Sec. 4 of the Clayton Act (15 U. S. C. Sec. 15) gives an injured party the right to sue for damages for an injury by reason of anything forbidden by the "anti-trust laws". Sec. 16 of the Clayton Act (15 U. S. C. Sec. 26) authorizes private suits for injunctive relief against threatened damage by a violation of the anti-trust laws. Sec. 1 of the Clayton Act (Title 15 U. S. C. Sec. 12) provides, in short, that the "anti-trust laws" shall include the Sherman Act, the Wilson Tariff Act and the Clayton Act itself. Sec. 1 of the Clayton Act (38 Stat. 730) refers to these three acts by their titles. In the codification of Sec. 1 of the Clayton Act reference to the titles of the acts has been omitted. (Title 15 U. S. C. Sec. 12.)

The Robinson-Patman Act (49 Stat. 1526) consists of Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), 2 (F), 2, 3 and 4. Its full context is set up in Appendix II attached to this petition.

The issue is whether Sec. 3 of the Robinson-Patman Act (15 U. S. C. Sec. 13-A) became one of the "anti-trust laws" as defined by Sec. 1 of the Clayton Act. The Court of Appeals held that it did not and hence a suit for damages and for injunctive relief could not be maintained under Secs. 4 and 16 of the Clayton Act. The Court of Appeals opinion is attached to this petition as Appendix I.

The Court of Appeals in reaching its conclusion relied upon three hypotheses upon which we shall now comment.

(A) The Court of Appeals considered that comments by Representative Miller of the Conference Committee supported its conclusion. The court took those remarks

out of context. An examination of the context of the Congressional Record shows that Representative Miller and other members of the House considered that Sec. 3 would, upon enactment of the bill, become a part of the Clayton Act. Therefore, the conclusion reached by the Court of Appeals is exactly the opposite of what is shown by the Congressional Record. In the interest of brevity of this petition, our summary of the context of the Congressional Record and pertinent remarks by Representative Miller and others appears in Appendix III attached to this petition.

B. The Court of Appeals considered that the report of the Conference Committee supported its conclusion. The report did not state either directly or indirectly that Sec. 3 was not an amendment to the Clayton Act or that Sec. 2 was the exclusive amendment of the Clayton Act. Likewise in the interest of brevity of this petition, our comments upon this aspect of the opinion of the Court of Appeals appear in Appendix III attached to this petition.

C. The Court of Appeals considered that the presence of quotation marks enclosing Sections 2 (A), 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F) and the absence of quotation marks from Secs. 2, 3 and 4 established that only the portions of the bill included in the quotation marks amended the Clayton Act.

We submit that whether Sec. 3 of the Robinson-Patman Act amended the Clayton Act and thus became a part of it is not to be determined by the presence or absence of quotation marks. Rather it is to be determined from the intent of Congress measured by the nature and character of the entire bill, and the affinity and relationship of the sections of the bill to each other and to the Clayton Act. For Sec. 3 to have been an amendment to the Clayton Act it need not have been so labeled. A law is amended when

it is permitted to remain and something is added or taken from it or it is in some way altered to better accomplish its purpose (*U. S.* v. *Lapp*, 244 Fed. 377-383, 6th Circuit (1917); *Vance* v. *Safeway Stores*, No. 5366, 10th Circuit, not yet reported).

Whether an act is amendatory of a prior act is to be determined by a comparison of their provisions and its character is not determined by the fact it does or does not profess to be an amendment (*Rubert Hermanos* v. *People of Puerto Rico*, 106 Fed. (2) 754-759, (1939), reversed on other grounds 309 U. S. 543 (1940).

Sec. 2 of the Clayton Act, prior to its amendment by the Robinson-Patman Act, made it unlawful to discriminate in price between different purchasers of commodities where the effect of such discrimination may be to substantially lessen competition or create a monopoly in any line of commerce. Sec. 2 (A) of the Robinson-Patman Act amended Sec. 2 in some particulars, but retains the foregoing provision relating to discrimination. Without going into all of the details of Secs. 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F), they forbid the giving of discounts except for services rendered, paying a customer for services or facilities without availing the same to all customers, forbidding discriminations in connection with the furnishing of services or inducing or receiving a price discrimination.

Sec. 3 of the Robinson-Patman Act makes it unlawful to discriminate against competitors of the purchaser in giving a rebate, discount or advertising service not available to such competitors; or to sell goods at lower prices in one section of the United States than in another, to destroy competition; or to sell goods at unreasonably low prices for the purpose of destroying competition.

It is clear that the entire Robinson-Patman Act has done no more than to widen the horizon of original Sec.

2 of the Clayton Act in dealing with monopolistic practices. All sections of the Robinson-Patman Act are integrated and inter-related parts of the whole. All of them deal with phases of monopolistic practices of the same general nature The purpose of the Robinson-Patman Act is to reach the operations of large interstate businesses in competition with small local concerns (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231-238 (1951)) and to protect small business unable to buy in quantities. (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37-49) (1948.) The Act barred the use of interstate business to destroy local business (*Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115-120) (1954).

We submit that by widening and extending original Sec. 2 of the Clayton Act through the adoption of Sec. 3 of the Robinson-Patman Act in company with its interrelated provisions in Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F), Congress clearly spoke its intention that Sec. 3 should become a part of the Clayton Act.

Respectfully submitted,

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APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11820. September Term and Session, 1956.

Nashville Milk Company,
Plaintiff-Appellant,

v.

Carnation Company,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

November 1, 1956.

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. This is an appeal from an order dismissing the complaint herein before trial. This action was brought under § 3 of the Robinson-Patman Act (§ 13a, Title 15 U. S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation

which owns and operates some 30 factories in 20 states for the processing of milk.

Since May, 1952, defendant has manufactured filled milk at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of § 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. § 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* v. *Ford Motor Company*, 7 Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation

of § 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question[1] and as far as we are advised, there has been no direct decision on the point by any Court of Appeals. There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balian Ice Cream Co. Inc.* v. *Arden Farms Co., et al.*, 94 F. Supp. 796 (DC Calif. 1950). The leading case to the contrary is *Vance* v. *Safeway Stores*, 137 F. Supp. 841 (DC N. Mex., 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balian Ice Cream* case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir., 213 F. 2d 284, 286; *Paine Lumber Company, Ltd. et al.* v. *Neal etc. et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26): Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "antitrust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "antitrust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act

1 Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 750, and *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

(Act of July 2, 1890), the Wilson Tariff Act (Act of August 27, 1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S. Code, section 1 of the Clayton Act was codified (15 U.S.C. § 12) to read: "'Antitrust laws' as used in sections 12-27 of this title (Title 15) includes sections 1-27 of this title." This was correct because sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. § 21a, § 13a and § 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of section 1 of the Clayton Act) to 12, 13, 14-21, 22-27," so that the statute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21 and 22-27 of this title includes secs. 1-27 of this title." But the codifiers failed to make a corresponding change in the figures 1-27 with the result upon casual inspection the term "antitrust laws" might seem to include secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* v. *United States*, 319 U.S. 423, 426.

Because section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that section 3 is not an amendment of the Clayton Act.

The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec. 2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as section 1 specifically did.

Immediately following the enacting clause, section 1 continues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws and Chapter 816, 49 Stat. 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their

bills in the Senate and House, respectively. About eight months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936 which incorporated the Borah-Van Nuys measure as section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902) expressly stated that only section 1 was an amendment of the Clayton Act. The report stated:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present Bill.*" (Emphasis supplied)

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way in-

consistent with the *provisions of the Clayton Act amendment provided for in section 1.*" (Emphasis supplied)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in section 1.*" (Emphasis supplied).

Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as the part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421): "Of course it is, *but it is not a part of the Clayton Act* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act. 50 *Harvard Law Review*, 106, 121-122; 85 *University of Pennsylvania Law Review*, 306, 312; 22 *Washington Law Quarterly*, 153, 159, 182; 22 *American Bar Association Journal*, 593, 649.

The Attorney General's National Committee to Study the Antitrust Laws said, on page 201 of its report of March 31, 1955:

"We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly

dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson-Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must be and is

AFFIRMED.

APPENDIX II.

THE ROBINSON-PATMAN ACT.

49 Stat. 1526.

[Public—No. 692—74th Congress.]

[H.R. 8442.]

AN ACT.

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

"Sec. 2 (a) That *it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the

discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce, to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Sec. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: *Provided*, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to

such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Sec. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

APPENDIX III.

A.

Summary of Remarks by Representative Miller and Others.

When the remarks of Representative Miller quoted in the opinion of the Court of Appeals are read in context they show that the subject of discussion was the effect of the criminal provision of Sec. 3 of the Robinson-Patman Act and whether it applied to that section only. The full discussion shows that Sec. 3 was considered part of the Clayton Act. Following the statement of Representative Miller quoted by the Court of Appeals and on the same page of the Congressional Record (80 Cong. Rec. 9421) the following appears (all emphasis supplied):

> Mr. Massingale: Does the bill agreed to by the conferees *carry the penalty of triple damages and also a penalty under the criminal law?*
>
> Mr. Miller: The penalty of criminal damages is the old law. In other words we made no change in that particular provision of the Clayton Act. Section 3 which the gentleman from New York talks about is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of the bill has nothing to do with criminal offenses. It deals primarily with the authority of the Federal Trade Commission to regulate and enforce the provisions of section 2 of the Clayton Act as amended. *Sec. 3 of the bill is placed in an effort to make the criminal offense apply only to that particular section*, and I believe that is a reasonable construction if you will look at the bill.
>
> Mr. Massingale: That is no criminal offense involved for anything outside of what is contained in that section?

Mr. Miller: In section 3.

Mr. Hancock: Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime *and is also subject to triple damages to anyone who claims to be aggrieved?*

Mr. Miller: That is true, but the criminal part is included in section 3 and section 3 only.

It also bears comment that on the preceding page of the Congressional Record (p. 9420) Representative Celler, a member of the Conference Committee, made the following statement:

> "Also let me point out that *this bill is an amendment to the Clayton Act*, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of discrimination. *In addition, for the same act of discrimination, to the triple damages* the business man accused can, by section 3 of this bill be hauled to court and fined $5,000 or imprisoned for one year."

On the same page of the Congressional Record it appears that Rep. Celler was asked by Rep. Hancock whether a vendor guilty of a discrimination would "be subject to the aggrieved party for damages, or has he committed a crime and subjected himself to a penalty?" Rep. Celler replied that if he violated the Borah-Van Nuys provision he would be subject to criminal penalties. Rep. Hancock then asked whether he would also be liable for triple damages. Rep. Celler replied, "*and he would have to respond in triple damages under the provisions of the Clayton Act.*" (All emphasis supplied.)

B.

COMMENTS UPON THE REFERENCES OF THE COURT OF APPEALS TO THE CONFERENCE COMMITTEE REPORT.

The Robinson-Patman Act consists of Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), 2 (F), 2, 3 and 4. (See Appendix II.) Sec. 2 (A) retains the substance of Sec. 2 of the Clayton Act. The substance of Secs. 2 (A), 2 (B), 2 (C), 2 (E), and 2 (F) is set forth in the petition. Sec. 2 provides that nothing "herein contained" shall effect rights of action or litigation pending or orders of the Federal Trade Commission based on Sec. 2 of the Act of October 15, 1914 (Clayton Act). The substance of Sec. 3 is set forth in the petition. Sec. 4 is an exemption of co-operative associations from the Act for the return of net earnings or surplus to members.

The opinion of the Court of Appeals quotes the portion of the Conference Committee report relating to Sec. 2 as follows (with italics supplied by the court):

"SECTION 2."

> "The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present bill.*"

The portion of the report given in italics by the court is to be interpreted by keeping in mind the provisions of the two sections of the bill to which the report referred. It will be remembered that Sec. 2 dealt with pending actions. Sec. 2 (A) made the same conduct unlawful that had previously been unlawful under Sec. 2 of the Clayton and,

additional matter was added in Secs. 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F) that had not been unlawful under Sec. 2 of the Clayton Act.

The only reasonable interpretation of the report is that the Committee was giving an explanation of why the subject matter of Sec. 2 had been included in a separate section. The matter in Sec. 2 was of a temporary nature only and was therefore given separately from Sec. 1 of the bill (Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), and 2 (F)) because the latter dealt with the Clayton Act and the former (Sec. 2) being of a temporary purpose only should not be commingled with the permanent provisions to be in the Clayton Act as amended. *The report did not state either directly or indirectly that Sec. 1 (Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), and 2 (F)) was the sole and exclusive amendment in the bill to the Clayton Act.*

The opinion of the Court of Appeals also quotes the portion of the Conference Committee report relating to Sec. 3 as follows (with italics supplied by the court):

"SECTION 3."

> "Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1.*"

The report stated that Sec. 2 of the bill contained the operative provisions of what had been the Borah-Van Nuys bill; that while they overlap in some respects they were not inconsistent with the provisions of the Clayton Act Amendment provided in Section 1. *Again, the Committee did not*

state Sec. 1 of the bill (Sec. 2 (A)) was the sole and exclusive amendment to Sec. 2 of the Clayton Act. It merely stressed the fact that there was no inconsistency between the two sections. The report then continued that Sec. 3 authorized nothing permitted by the amendment found in Sec. 1 of the bill and took nothing from it. All that the report professed to do was to harmonize Secs. 1 and 3 of the bill, showing that they neither overlapped nor were inconsistent.

The most significant thing about the report *is that nowhere does it state that Sec. 3 is not a part of the Clayton Act.* For a Conference Committee to recommend that Congress pass an act which, as we have already seen, in all of its parts widened the horizon of the Clayton Act and not to have called the attention of Congress in express words that one of the sections in the bill (Sec. 3) though playing a vital role in the widening of the Clayton Act was not a part of that Act but an independent enactment is both unreasonable and unrealistic.